RECENT DECISIONS.

ADMINISTRATIVE LAW—MANDAMUS—APPEAL AFTER COMPLIANCE WITH UNAUTHORIZED WRIT.—The defendant Board of Elections was required by statute to cause election notices to be published in four newspapers advocating the principles of the Democratic party, which duty they had admittedly failed to perform. The petitioner, editor of a Democratic newspaper, applied for a peremptory writ of mandamus commanding the defendants to convene and designate his newspaper. The writ, however, commanded the defendants to designate four newspapers advocating the candidacy of H., the Democratic candidate for governor. The defendants complied and then appealed. *Held*, that no appeal would be allowed, since it would be useless. *People ex rel. Quinn* v. *Voorhis* (App. Div. 1906) 100 N. Y. Supp. 718.

Mandamus will lie to compel subordinate tribunals performing judicial and discretionary functions, to act, but not to compel them to act in a particular way. *People ex. rel. Francis* v. *Common Council* (1879) 78 N.Y. 33; *People ex. rel. Millard* v. *Chapin* (1887) 104 N.Y. 96. The petitioner's prayer for relief could therefore not have been granted. Moreover, since the relief granted cannot extend beyond that asked for, *Bangor* v. *Commissioners* (1895) 87 Me. 294; *School District* v. *Lauderbough* (1883) 80 Mo. 190, and since the writ in the principal case required the defendants to designate papers supporting a certain candidate, in excess of their statutory power, *People ex rel. Bailey* v. *Supervisors* (1851) 12 Barb. 217; *Rice* v. *Walker* (1876) 44 Ia. 458, the action of the lower court was unauthorized and void, and the defendants' appeal should have been successful. But since the extraordinary remedy of mandamus can never be invoked to do a useless thing, *Aff* v. *Hopkins* (1894) 57 Ill. App. 529; *Potts* v. *Tuttle* (1890) 79 Ia. 253; *Clark* v. *Miller* (1874) 54 N. Y. 528, the appeal in the principal case was properly dismissed.

ADMINISTRATIVE LAW—PUBLIC OFFICER—RE-ELECTION TO SAME TERM AFTER REMOVAL.—Section 2462 of the General Statutes of Kansas, 1901, provided that "for a failure or neglect of official duty in the enforcement of this act, any of the city or county officers may be removed by civil action." The defendant was removed from office in quo warranto proceedings, the judgment declaring him disqualified from holding the office for the remainder of the term. Subsequently at a special election he was re-elected to fill the vacancy, and took possession of the office. *Held*, the defendant was in contempt of court. *State* v. *Rose* (Kan. 1906) 86 Pac. 296.

A judgment of ouster in quo warranto would ordinarily simply prevent the defendant from holding under the title put in issue, and would not prevent him holding under another title not in issue. *State* v. *Smith* (1891) 17 R. I. 415. The court in the principal case decided that the above section expressed the legislative intent that the incumbent removed should be disqualified from holding the office during the remainder of the term. This interpretation seems rather extreme. See Dillon, Mun. Corp., 4th ed., § 248 citing *State* v. *Jersey City* (1856) 25 N. J. (1 Dutch.) 536. See also *State* v. *Dart* (1894) 57 Minn. 261.

CONFLICT OF LAWS—USURY—MORTGAGES.—A contract for the loan and repayment of money upon terms valid in Massachusetts but usurious in New York, was made in Massachusetts by two citizens thereof, the loan and repayment to be made in the same state, secured by a mortgage executed in Massachusetts on real estate in New York. *Held*, the mortgage was not void, for the laws of New York did not apply. *Manhattan Life Ins. Co.* v. *Johnson* (1906) 101 N. Y. Supp. 65.

Though a contract is ordinarily governed by the law of the place where it is made, *Fitch* v. *Ramer* (1860) 1 Flipp. 15, under a conflict of laws, the law of the place of performance governs. *Curtis* v. *Leavitt* (1857) 15 N. Y. 9; *Robinson* v. *Bland* (1760) 2 Burr. 1077. Though on principle, therefore, interest should be governed by the law of the place of payment, *Cutler* v. *Wright* (1860) 22 N. Y. 472; *Caesar* v. *Capell* (1897) 83 Fed. 403, an exception is made in the case of usury, when necessary to avoid a forfeiture. *Balme* v. *Wombough* (1862) 38 Barb. 352; *Wayne etc. Bank* v. *Low* (1880) 81 N. Y. 566; 2 Kent, Com. 460; *Curtis* v. *Leavitt*, supra; *Peck* v. *Mayo* (1842) 14 Vt. 33. Moreover, in New York the same exception has been made where the loan, or the contract to loan or repay was made outside of the jurisdiction offended, but the execution of the bond or note was within it. *Western etc. Co.* v. *Kilderhouse* (1882) 87 N. Y. 430. If the loan is valid where made, therefore, provision for repayment in New York or the execution of the mortgage therein, should not vitiate the transaction when sued upon in New York. See *Williams* v. *Fitzhugh* (1868) 37 N. Y. 444; *Cope* v. *Wheeler* (1869) 41 N. Y. 303. Some earlier cases held that if the mortgage involved title to realty, the lex situ governed, *Chapman* v. *Robertson* (N. Y. 1837) 6 Paige 627; *Goddard* v. *Sawyer* (1864) 9 Allen 78; *McGoon* v. *Scales* (1869) 9 Wall. 23 but the weight of authority supports the principal case in holding that the mortgage, being merely incident to the contract, does not change its operation, and if the contract is valid by the above rules, the mortgage is not void on the ground of usury under the lex situ. *De Wolf* v. *Johnson* (1825) 10 Wheat. 367, *Cope* v. *Wheeler*, supra.

CONSTITUTIONAL LAW—FOREIGN CORPORATIONS—SERVICE OF SUMMONS ON STATE AUDITOR—DUE PROCESS OF LAW.—A statute authorized service of summons upon the state auditor as service upon any foreign corporation against which a cause of action should accrue to a citizen or resident of the state. In an action against a foreign corporation doing business in the state a personal judgment was rendered based upon a service under this statue. *Held*, the statute was unconstitutional. *Cella Com. Co.* v. *Bohlinger* (1906) 147 Fed. 414.

Of course a state either can condition the entrance of a foreign corporation within its limits upon consent to such service, *Merchants Mfg. Co.* v. *Ry. Co.* (1882) 13 Fed. 358; *Knapp, Stout & Co.* v. *Nat. Ins. Co.* (1887) 30 Fed. 607, or can by a proceeding in rem use any foreign corporation's property within the state to discharge the corporation's liabilities. See *Moulin* v. *Ins. Co.* (1853) 24 N. J. L. (4 Zab.) 222, 244. The objectionable feature of the statute in the principal case was its authorization of a personal judgment against a foreign corporation not doing business in the state and consequently not within the state's jurisdiction. This was clearly contrary to the fourteenth amendment. *Pennoyer* v. *Neff* (1877) 95 U. S. 714, 733; *St. Clair* v. *Cox* (1882) 106 U. S. 350. The objectionable part, moreover, was so inseparably embodied in the act under the general terms used, that the court was bound to construe the act as an entirety. But cf. *Conn. etc. Ins. Co.* v. *Spratley* (1899) 172 U. S. 602.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—EMPLOYERS' LIABILITY ACT.—One Brooks employed by the defendant on one of its locomotives engaged in interstate commerce was killed by reason of the negligence of a fellow employee. Upon suit for damages by the plaintiff administratrix under and by virtue of the Employers' Liability Act approved by Congress June 11, 1906, the defendant demurred. *Held*, the act was unconstitutional. *Brooks* v. *The Southern Pacific Co.* (U. S. C. C. West. Dist. Ky. Dec. 31, 1906).

One Howard, a locomotive fireman, received certain injuries inflicted by the defendant railroad companies from which he died. The plaintiff administratrix of said Howard sued the defendants for damages under and by virtue of the act of Congress, approved June 11, 1906, commonly known as the Employers' Liability Act. The defendants de-

murred. *Held*, the act was unconstitutional. *Howard* v. *The Ill. Cent. RR. Co. et al.* (U. S. C. C. West Dist. Tenn. West. Div. Jan. 1, 1907). See NOTES p. 116.

CONSTITUTIONAL LAW—PARDON—EFFECT OF BREACH OF CONDITION.—The constitution of Idaho provided for a "Board of Pardons" with power to grant pardons "upon such conditions as they may impose." The petitioner was pardoned upon the condition that he remain in the state, report each month to the warden, be returned to the penitentiary at will of the Board of Pardons and in the latter event happening he was to serve the full unexpired term of his original sentence. *Held*, the petitioner was virtually a prisoner during his parole, and therefore the condition was unconstitutional as being an infringement of the judicial power to impose sentences and furthermore that the period of the parole must be deducted from the unexpired term of the sentence. *Ex parte Prout* (Id. 1906) 86 Pac. 275.

The constitutional provision above should be considered as declarative of the common law that pardons may be granted upon conditions that are not illegal, immoral, or impossible of performance. *State* v. *Barnes* (1889) 32 S. C. 14; *People* v. *Burns* (1894) 77 Hun 92, aff'd. 143 N. Y. 665. Infliction of a lighter punishment as a condition of pardon is uniformly held a legal condition, *Ex parte Wells* (1855) 18 How. 307, and the other condition in the principal case that upon breach of any condition the prisoner serve out the full unserved time of his original sentence seems to be merely giving expression to what if omitted should have been implied as a matter of law, *Arthur* v. *Craig* (1878) 48 Ia. 264; *Lee* v. *Murphy* (Va. 1872) 22 Grat. 789; *Com.* v. *Haggerty* (Pa. 1869) 4 Brewst. 326, unless changed by Statute, *West's Case* (1873) 111 Mass. 443. It is submitted that the court has been led astray by the error pointed out in *Ex parte Wells*, supra, at page 315; viz., in considering the condition of a pardon as an exercise of a new power instead of as an incident of the pardon.

CONSTITUTIONAL LAW—TAXATION—PRIVATE PURPOSE.—A statute directed $25 quarterly to be paid out of a fund raised by taxation to every indigent, adult, blind person within the county. *Held*, the statute was unconstitutional. *Auditor of Lucas County* v. *State ex. rel. Boyles* (Ohio 1906) 78 N. E. 955.

Taxation must be for a public purpose. *Loan Ass'n.* v. *Topeka* (1874) 20 Wall. 665. The Legislature decides what is a proper purpose; *Sharpless* v. *Mayor* (1853) 21 Pa. St. 147, but where it has obviously overstepped its authority the courts may declare the tax unconstitutional; *Freeland* v. *Hastings* (1865) 10 Allen 570, 575, and the Legislature's declaration that the purpose is a public one will not prevent its unconstitutionality where it is private in effect. *Tyson* v. *School Directors* (1845) 51 Pa. St. 9, 21; 1 Cooley, Tax. 183. Where the purpose is lawful, the means are in the discretion of the Legislature. *McCulloch* v. *Maryland* (1819) 4 Wheat. 316. But if the means adopted will evidently cause the money to be appropriated to a private purpose the court may declare the tax unconstitutional, just as the courts deny the Legislature's power of conclusive definition. *Hitchcock* v. *St. Louis* (1872) 49 Mo. 434. See, *McCulloch* v. *Maryland*, supra, 325; *St. Mary's School* v. *Brown* (1876) 45 Md. 310. The support of the indigent blind is a public purpose, *Booth* v. *Town of Woodbury* (1864) 32 Conn. 118, but the donation of money to an individual to use at his will, *Bush* v. *Board of Supervisors* (1899) 159 N. Y. 212, or the repair of private fortunes, *State* v. *Osawkee Township* (1875) 14 Kans. 418, or the furtherance of private business, *Clee* v. *Landers* (1889) 74 Mich. 692, is not. As the avowed and actual purpose in the principal case is public, and as it is not obvious that the means of distribution would cause its employment for any private purpose, the statute should have been upheld.

CONTRACTS—OFFER OF REWARD—ACCEPTANCE.—The defendant, as sheriff of a county, offered a reward "for the arrest of each of the parties convicted" of a certain bank robbery and murder. The plaintiff, knowing of this offer, gave information which led to the arrest of the criminal, who was subsequently convicted, largely on evidence furnished by the plaintiff. *Held*, Hook J., dissenting, that the plaintiff could not recover the reward. *McClaughtry* v. *King* (1906) 147 Fed. 463.

Many jurisdictions construe such an offer literally, and hold that the acceptance contemplated is an actual arrest. *Everman* v. *Hyman* (1891) 3 Ind. App. 459; *Juniata Co.* v. *Macdonald* (1888) 122 Pa. St. 115. But the arrest may be made through an agent, who may be a police officer acting not as such but solely under the direction of the one claiming the reward. *Ralls Co.* v. *Stephens* (1904) 104 Mo. App. 115. In other jurisdictions, however, it is held that a recovery under such an offer may be had by one who gives information leading to the arrest. *Crawshaw* v. *City of Roxbury* (1856) 7 Gray 374; *Haskell* v. *Davidson* (1898) 91 Me. 488; *Besse* v. *Dyer* (1864) 9 Allen 151; *Kinn* v. *Bank* (1903) 118 Wis. 537. This would seem to be the sounder view. In some cases it is indicated by the wording of the offer that an actual arrest is contemplated as acceptance. *Shuey* v. *U. S.* (1875) 92 U. S. 73; *Sias* v. *Hallock* (1879) 14 Nev. 332. But where the wording of the offer is simply "for the arrest," or "for the arrest and conviction," and no attending circumstances are shown which would lead to the conclusion that an actual arrest was contemplated in the offer, it appears that the service contemplated is substantially performed by giving information leading to the arrest. In the principal case, therefore, the dissenting opinion is preferable.

CONTRACTS—RESCISSION—RIGHT TO SUBSEQUENT QUASI-CONTRACTUAL ACTION.—A contract for the sale of cattle by the defendant to the plaintiff was made, under which the defendant was to deliver the cattle at a specified time and place. The defendant did not so deliver them, and the plaintiff brought an action for that part of the purchase money already paid. *Held*, that the defendant had "wrongfully rescinded," and that the plaintiff might in quasi-contracts recover the money paid by him. *William Hanley Co.* v. *Combes* (Or. 1906) 87 Pac. 143. See NOTES, p. 123.

CRIMINAL LAW—FORGERY—INTERPRETATION OF STATUTE.—The defendant, a bounty inspector made and delivered a bounty certificate, certifying that a third person had exhibited skins to him and filed the necessary affidavits, both of which facts were false and known to be false by defendant. *Held*, such certificate was a forgery under Pol. Code § 3078, providing that any person who shall falsely make a certificate relating to bounties on wild animals shall be guilty of forgery. *In re Terrett* (Mont. 1906) 86 Pac. 266.

In the construction of similar statutes, the weight of authority does not support the principal case, but favors the view that the "falsely making" has reference not to the contents or tenor of the instrument, but to its genuineness, the falsity consisting in its purporting to be the instrument of some person other than the one actually signing. *Commonwealth* v. *Foster* (1873) 114 Mass. 319; *State* v. *Young* (1865) 46 N. H. 266; *U. S.* v. *Moore* (1894) 60 Fed. 738; *U. S.* v. *Cameron* (Dak. 1882) 13 N. W. 561. This construction is in accord with the general rule at common law, although an exception was made in the case of a deed antedated by the grantor, so as to make it appear valid, as against what was in fact a prior deed of grantor. 3 Coke, Inst. 169; *Queen* v. *Ritson* (1869) L. R. 1 C. C. 200.

DAMAGES—EXEMPLARY DAMAGES—THEORY OF.—In an action for assault and battery of aggravated nature, punitive damages were allowed. The defendant had previously been punished in a criminal prosecution for the same assault. *Held*, the allowance of punitive damages was not error. *Doerhoefer* v. *Shewmaker* (Ky. 1906) 97 S. W. 7. See NOTES, p. 122.

DOMESTIC RELATIONS—ALIMONY—ASSIGNABILITY.—The complainant sought to set aside her assignment of alimony which was due when assigned. *Held*, her prayer should be granted. *Fournier* v. *Clutton* (Mich. 1906) 109 N. W. 425.

The non-assignability of alimony not yet due is generally recognized, largely because of public policy, *Jordan* v. *Westerman* (1886) 62 Mich. 170; *Lynde* v. *Lynde* (1902) 64 N. J. Eq. 736, as well as because of the personal nature of the claim. *In re Robinson* (1884) L. R. 27 Ch. Div. 160; *Kempster* v. *Evans* (1892) 81 Wis. 247. But the principal case presents the apparently novel question whether a past due installment is also non-assignable. Although alimony "is property in one sense" yet it "is not strictly a debt due to the wife, but rather a general duty of support made specific and measured by the court," and "it is a specific fund provided for a specific purpose, with restraint and limitation written all over its face by the very law and decree which brought it into existence." *Romaine* v. *Chauncey* (1892) 129 N. Y. 566. Since pensions, created by statute, are by statute, U. S. R. S. § § 4745, 4747, made non-assignable not only as to future but also as to presently or past due installments, it would seem that, analogously, alimony, created by chancery, could also by chancery be made non-assignable, not only as to future but also as to past due installments, and that the public policy which governs the creation of alimony could consistently be invoked as a ground for the court's continuing to oversee its direction and disposition until actually in the hands of the beneficiary designed by the decree.

DOMESTIC RELATIONS—BREACH OF MARRIAGE PROMISE—INCURABLE DISEASE AS A DEFENSE.—The defendant became engaged to the plaintiff knowing that the plaintiff had consumption in an incurable form. *Held*, that the plaintiff's disease constituted a valid defense for defendant's breach of promise. *Grover* v. *Zook* (Wash. 1906) 87 Pac. 538.

If one party to a contract to marry conceals a material fact such as chastity or serious disease existing at the time, the other party has a defense of fraud to a suit for breach of promise. *Gring* v. *Lerch* (1886) 112 Penn. St. 244, s. c. 56 Am. Rep. 314. Also, where subsequent to the promise one party is afflicted without his fault with a dangerous incurable disease, performance is excused. *Sanders* v. *Coleman* (1899) 87 Va. 690, s. c. 41 L. R. A 581; *Shackelford* v. *Hamilton* (1892) 13 Ky. 80, s. c. 40 Am. St. Rep. 166. The facts of the principal case bring it within neither of the above rules and its decision seems one of first impression. The doctrine that such a contract is against public policy because the disease is contagious and transmissible to the children of a marriage, while appearing reasonable, may easily be carried to an extreme.

DOMESTIC RELATIONS—DIVORCE—PROHIBITION OF REMARRIAGE—SUBSEQUENT MARRIAGE OUTSIDE JURISDICTION.—The plaintiff's husband was divorced under a statute prohibiting his remarriage within a year. He married, however, outside the jurisdiction before the year had elapsed. *Held*, that the marriage was void in the jurisdiction, but became valid by ratification after the disability was removed at the end of the year. *Mock* v. *Chaney* (Col. 1906) 87 Pac. 538.

Since remarriage outside the jurisdiction after such a prohibition as in the principal case can be declared void within the jurisdiction by the Legislature, *State* v. *Tully* (1890) 41 Fed 753; Mass. Pub. States c. 145 § § 4, 10; note, 60 Am. St. Rep. 941, whether such remarriage is void or not is a question of legislative intent. By the great weight of authority under such a prohibition if there is a remarriage within the jurisdiction, the Legislature is taken to have meant it to be void, 1 Bishop, Mar., Div. & Sep. § 707 n. 6; but see, 2 id. § 1621; while if a remarriage takes place out of the jurisdiction it is to be considered valid, note 61 Am. St. Rep. 941. This interpretation of the Legislative intent seems difficult to support. The view of the principal case seems more reasonable, see *Williams* v. *Oates* (N. C. 1845) 5 Ired. 535, while the doctrine of ratification

removes in many cases the undesirable results which follow from void marriages.

DOMESTIC RELATIONS—MARRIAGE UNDER DURESS—VOID OR VOIDABLE.—The plaintiff's husband was coerced, by threats against his life, into marrying the plaintiff. *Held*, that the plaintiff was not entitled to the insurance money payable to the "widow." *Grant Lodge* v. *Smith* (Miss. 1906) 42 So. 89. See NOTES, p. 128.

EQUITY—DECREES ENFORCING FORFEITURE.—Lessees for fifty years covenanted to build a new building on the leased premises to be completed within five years. The lease provided a forfeiture in case of breach by the lessee of any covenant. The building was not begun at the end of the five years and the lessor gave notice of his intention to enforce the forfeiture. Subsequently the lessees were declared bankrupts. *Held*, that a decree of the bankruptcy court directing the trustee to surrender the premises although acknowledged to be a decree enforcing a forfeiture would be affirmed. *Lindeke* v. *Ass. Realty Co.* (1906) 146 Fed. 630.

The ordinary rule is that equity will not affirmatively aid a forfeiture. A justifiable exception has been made in the case of gas and oil leases on the ground that there is no remedy in law and that by no other means than by the enforcement of the forfeiture can the lessor get justice. 6 COLUMBIA LAW REVIEW 467. The decision in the principal case extends this exception from gas and oil lease cases upon which it rests as authority to all cases where the reasons for the exception exist. This step in advance is a commendable one. See *Ry. Co.* v. *Ragsdale* (1876) 54 Miss. 200.

EQUITY—ELECTION—POSTNUPTIAL SETTLEMENT IN LIEU OF DOWER.—A husband executed an unsealed writing a few months before he died, by which he gave his wife a certain house and lot, the most valuable of the three that he owned, in pursuance of an antenuptial promise in consideration of marriage. *Held*, that she could recover the house and lot in equity only upon condition that she released her dower in the other two. *Cowdrey* v. *Cowdrey* (N. J. 1906) 64 Atl. 98.

The doctrine of equitable election is applicable to deeds as well as to wills, *Moore* v. *Butler* (1805) 2 Sch. and L. 250, 266; *Barrier* v. *Kelly* (1903) 82 Miss. 233, although cases of its application to deeds arise infrequently. It was well settled at common law that a widow could not be put to her election between dower and a provision in her husband's will unless the husband's intention was clearly to that effect, *Birmingham* v. *Kirwan* (1805) 2 Sch. and L. 444, 451, and the presumption was against making her elect. *Church* v. *Bull* (1845) 2 Denio 430; *Roadley* v. *Dixon* (1827) 3 Russ. 192, 200. By modern statutes in some states, including New Jersey, the presumption has been reversed. N. J. Rev. Stats. 1877, p, 322, sec. 16; see *Stark* v. *Hunton* (N. J. 1831) Saxt. 216. Yet it does not follow that such a statute should be extended beyond its terms so as to apply to deeds. Inasmuch, therefore, as in the principal case there was no evidence of the husband's intention to put the wife to her election save the value of the house and lot and the date of the gift, the maxim, "He who seeks equity must do equity" has no application, and no condition should have been imposed upon the wife.

EQUITY—RIGHTS OF BONA FIDE PURCHASER.—A deed of trust to secure two notes was executed in favor of the plaintiff. One of the notes was subsequently paid and given up to the maker. Not being cancelled a third party obtained possession of it and, fraudulently representing that it was unpaid, induced the trustee to sell the land subject to the trust which he bought in. After charging it with a trust to secure a loan from a bank he sold the remaining equity to the defendant who knew of the trust deed in favor of the bank but who had no notice of the vendor's fraud in obtaining the land. The plaintiff sought to have the defendant's equitable interest charged with the trust for the amount remaining

unpaid on the second note. *Held*, that, since between conflicting equities the prior prevails, the defense of a *bona fide* purchase was of no avail. *Wasserman* v. *Metzger* (Va. 1906) 54 S. E. 893. See NOTES, p. 125.

EQUITY—TRYING TITLE TO OFFICE—JURISDICTION BY CONSENT.—The plaintiff brought a bill in equity to enjoin the defendants from acting as councilmen, setting up plaintiff's own right to act in that capacity. *Held*, that as the parties had agreed to waive the question of jurisdiction, equity had jurisdiction. *Hayes* v. *Sturges* (Penn. 1906) 64 Atl. 828.

Although the true rule would seem to be that consent cannot confer jurisdiction, *Granley* v. *Granley* (1887) 84 Va. 145; *Cummins* v. *White* (Ind. 1837) 4 Blackf. 356, 362, equity in certain cases has taken jurisdiction by consent where the subject matter of the suit, though properly triable at law, was within the general jurisdiction of equity, *O'Brien* v. *McCarthy* (1893) 71 Hun 427; *Tugel* v. *Tugel* (1874) 38 Ia. 349; but not where the general subject matter was foreign. *McDonald* v. *Crockett* (S. C. 1827) 2 McCord's Ch. 130, 135; *Stout* v. *Cook* (1866) 41 Ill. 447, 448. But see *O'Brien* v. *Putney* (1880) 55 Ia. 292. Since political rights, the subject matter of the principal case, are rights with which equity had nothing to do, 5 Pomeroy Eq. Jur. § 333, the court was unwarranted in assuming jurisdiction, both upon principle and authority. The parties should have been left to their proper remedy, an action at law, quo warranto. 4 COLUMBIA LAW REVIEW 438.

EVIDENCE—ADMISSIONS—EFFECT IN ESTABLISHING ALLEGATION.—In an action for the recovery of a deposit made in the sale of certain property the plaintiff based his case on alleged false representations by the vendor as to the amount for which the property had previously rented. The defendant when reproached by the plaintiff for making the statement had contended that he had merely represented that the property might be made to rent for the price, thereby incidentally admitting that the property did not rent for the price. This admission was the only evidence offered to show the falsity of the representations if made. *Held*, it was sufficient to establish the allegation. *Rosenblum* v. *Liener* (1906) 98 N. Y. Supp. 836. See NOTES, p. 118.

EVIDENCE—WITNESSES—PRIVILEGE—HUSBAND AND WIFE—DIVORCE.—The witness was the wife of the defendant in a murder trial, at the time of the murder, but had since obtained a divorce. *Held*, her testimony was admissible. *State* v. *Mathews* (Ia. 1906) 109 N. W. 616.

To induce absolute freedom of communication between husband and wife, it is almost universally held that the privilege continues in spite of the termination of the marital relation; Wigmore Ev. § 2341, either by death, *Lingo* v. *State* (1859) 29 Ga. 470, or by divorce. *State* v. *Kodat* (1900) 158 Mo. 125; *Nolen* v. *Harden* (1884) 43 Ark. 307; *State* v. *Phelps* (Vt. 1803) 2 Tyler 374. Iowa allows the privilege in cases of the death of either spouse, *Hertrich* v. *Hertrich* (1901) 114 Ia. 643; *In re Evans' Estate* (1901) 114 Ia. 240, but the reasons of maintaining the privilege are stronger in cases of divorce than in death. *Cook* v. *Grange* (1849) 18 Oh. 526; *Crook* v. *Henry* (1870) 25 Wis. 569.

MUNICIPAL CORPORATIONS—LIABILITY FOR INJURY IN ADMIRALTY.—The plaintiff suffered damage because of the negligence of vessels owned by the Port of Portland, a municipal corporation of the state of Oregon, organized to exercise purely governmental functions. *Held*, the municipal corporation was liable *in personam*. *United States* v. *Port of Portland* (Or. 1906) 147 Fed. 865. See NOTES, p. 127.

MUNICIPAL CORPORATIONS—LIABILITY FOR INTEREST ON WARRANTS.—Certain warrants were issued by a city on its general fund and when due were presented for payment and indorsed by the treasurer "Not paid for want of funds." *Held*, that thereafter they bore the legal rate of interest. *State* v. *Stout* (Wash. 1906) 86 Pac. 848.

Some authorities hold that warrants or orders of municipal corporations, when due and after presentment and refusal of payment, do not bear interest in the absence of legislation clearly providing to the contrary, on the ground that at common law there was no interest, that interest was in the nature of a penalty for non-payment, and that as a State could not be guilty of laches so a municipal corporation could not, and that the latter was not included under the general laws as an individual. *Madison County* v. *Bartlett* (1832) 2 Ill. 67; *Warren County* v. *Klein* (1876) 51 Miss. 807. The contrary rule, however, seems the better. 1 Dillon, Mun. Corp. 4th Ed. § 506. Interest is not a penalty but an incident to the debt after due and a municipal corporation being capable of acquiring rights and incurring liabilities is logically included by general laws relating to interest. *Brown* v. *Johnson Co.* (Ia. 1848) 1 Greene 486; *Yellowly* v. *Pitt Co.* (1875) 73 N. Car. 164; *Seymour* v. *Spokane* (1893) 6 Wash. 362. The Tennessee courts must have realized that such interest should be allowed when in the face of the opposite doctrine, *Camp* v. *Knox Co.* (Tenn. 1879) 3 Lea 199, they state that a jury has an "equitable power to give interest by way of damages." *Gibson Co.* v. *Raines* (1883) 11 Lea 20, 24. The principal case is further strengthened by the fact that a city ordinance provided that such warrants should bear interest. *Scranton* v. *Hyde Park Gas Co.* (1883) 102 Pa. St. 382; *Naar* v. *Inhabitants of City of Trenton* (1880) 42 N. J. L. 500.

MUNICIPAL CORPORATIONS—LIABILITY FOR SURFACE WATERS—CONSTITUTIONAL PROVISIONS.—A city was built on the side of a hill. The plaintiff owned a mill at the foot of the hill outside the city's limits. He complained that by the change of rural property into urban, by the building and extension of streets, etc., the flow of surface water was greatly increased and accelerated so that his mill was injured. The Constitution provided that a municipal corporation should make compensation for property taken, injured, or destroyed by the construction or enlargement of its works, highways and improvements. *Held*, the city was not liable. *Strauss* v. *City of Allentown* (Pa. 1906) 63 Atl. 1073.

Such a constitutional provision removes the exemption of a city from liability for injury or damage to property, *Keasy* v. *City of Louisville* (Ky. 1836) 4 Dana 154, as distinguished from a taking of property. 2 Dillon, M. Corp., 4th ed. § § 992, 995a. Since an individual landowner is not liable for increasing the flow of surface waters upon the land of another by improvements on his own land, see note 85 Am. St. Rep. 728, it is difficult to see why the city should be under any greater liability. *O'Brien* v. *City of St. Paul* (1878) 25 Minn. 331; 2 Farnam, Waters & Water Rights 975 n. 2. But see, *Woodbury* v. *Beverly* (1891) 153 Mass. 245.

NEGOTIABLE INSTRUMENTS—NOTICE OF DISHONOR—ADDRESS.—Notice of dishonor was personally delivered to the defendant indorser at his place of business, but the envelope and notice itself were addressed to plaintiff who was a subsequent indorser. *Held*, it was not sufficient to charge defendant. *Marshall* v. *Sonneman* (Pa. 1906) 64 Atl. 874.

The notice of dishonor must indicate that the party notifying intends to hold the indorser liable, *Juniata Bank* v. *Hale* (Pa. 1827) 16 Serg. & R. 157, but this is implied when the notice comes from the holder and is correctly addressed. *Bank* v. *Carneal* (1829) 2 Pet. 543. Where the notice is misdirected a delivery will cure this, *Beals* v. *Peck* (1851) 12 Barb. 245, under circumstances which will apprise the indorser that the notice is meant for him. *Carter* v. *Bradley* (1841) 19 Me. 62. The question of sufficiency of notification is for the court. *Cayuga Bank* v. *Warden* (1851) 6 N. Y. 19. In the principal case the court might well have held that because of the apparently intentional delivery to defendant, he should have assumed that he was to be bound by the notice.

PLEADING AND PRACTICE—COURTS—CRIMINAL JURISDICTION—DETERMINED BY MAXIMUM PUNISHMENT.—The statutes of Washington pro-

vided that justices of the peace should have jurisdiction in all misdemeanors where the offense charged was not punishable by imprisonment or by a fine greater than $100. *Held*, that a justice did not exceed his jurisdiction in imposing a fine of $25 for an offense made punishable by statute by a fine of not more than $200, or by imprisonment for not more than 90 days, or both. *State* v. *Davis* (Wash. 1906) 86 Pac. 201.

It is the claim as presented in an action and not the claim as decided which primarily determines the jurisdiction. *Kanouse* v. *Martin* (1853) 15 How. 198. In civil actions this claim is generally definite, *Gordon* v. *Longest* (1842) 16 Pet. 97, although sometimes in the alternative, when the largest sum would seem to determine the jurisdiction. See *Welles* v. *Allen* (1874) 41 Conn. 140; but in criminal actions the claim is generally alternative in its nature. *Mackin* v. *U. S.* (1885) 117 U. S. 348, in which case it was determined that the test in the question as to the necessity of an indictment is not whether or not the court has awarded an infamous punishment but whether it may do so. The underlying principle seems to be that the legislature has intentionally left to the discretion of the courts within certain bounds, the determination of the proper punishment after a full hearing of the cause, and this object would be frustrated if the district attorney could at will bring the cause before a tribunal where the full discretion, as intended by the Legislature, could not be exercised. If this principle is sound the decision in the principal case is incorrect.

PLEADING AND PRACTICE—PARTIES DEFENDANT—SECTION 723 OF CODE.—After the commencement of an action for personal injuries, an order was granted bringing in the other joint tort-feasor as a co-defendant, upon the application of the plaintiff and with the consent of the defendant. *Held*, such order was unauthorized by § 723, Code of Civil Procedure. *Horan* v. *Bruning* (App. Div. 1906) 36 N. Y. L. Jour. No. 82.

The decisions on Sec. 723 and its related section, 452, are in great conflict, the former being at first so widely construed as to permit a practical substitution of parties defendant, *New York etc. Co.* v. *Remington's Works* (1881) 25 Hun 475, but was limited on appeal to necessary parties. 89 N. Y. 22; see *Heffern* v. *Hunt* (1896) 8 App. Div. 585. Under it, however, a joinder of joint tort-feasors as attempted in the principal case has been permitted in *Schun* v. *Ry. Co.* (1903) 82 App. Div. 560 (2d Dept.), following *Romanoski* v. *Union Railway Co.* (1899) 30 Misc. 830, but denied in *Heffern* v. *Hunt*, supra (4th Dept.). From its language it seems applicable mostly to formal defects.

PLEADING AND PRACTICE—PARTIES DEFENDANT—SECTION 452 OF CODE.—After the commencement of an action for personal injuries, an order was granted bringing in the other joint tort-feasor as a co-defendant, upon the application of the plaintiff and with the consent of the defendant. *Held*, such order was unauthorized by § 452, Code of Civil Procedure. *Horan* v. *Bruning* (App. Div. 1906) 36 N. Y. L. Jour. No. 82.

Chapman v. *Forbes* (1890) 123 N. Y. 532 decided that § 452, 1st clause, applied only to equitable actions. In an action at law, purely for money damages, it is therefore inapplicable. *Bauer* v. *Dewey* (1901) 166 N. Y. 402; *Heffern* v. *Hunt* (1896) 8 App. Div. 585. Though naturally most cases demanding its application are equitable in form, the true rule, it is submitted, is that it should also be applied to cases which, though legal in form are converted by the answer into ones really equitable in their nature. See, *Oishei* v. *Ry. Co.* (1905) 101 App. Div. 473; *Hilton etc. Co.* v. *Ry. Co.* (1895) 145 N. Y. 390; *Derham* v. *Lee* (1882) 87 N. Y. 599; contra, *Chapman* v. *Forbes*, supra; *Bauer* v. *Dewey*, supra; *Long* v. *Burke* (1905) 105 App. Div. 457. The present anomalous results yielding inconsistent judgments and a multiplicity of suits would thus be avoided. Cf. *Steinbach* v. *Prudential etc. Co. of America* (1902) 172 N. Y. 471, where the original demand for simple money damages might have been regarded as an investigation of a trust fund. Sec. 452, 2d clause, applies to both legal and equitable actions, but the co-defendant must himself apply to be brought in. *Heffern* v. *Hunt*, supra; *Goldstein* v.

Shapiro (1903) 85 App. Div. 83. Earlier decisions did not limit it to cases involving title, *Montague* v. *Jewelers' etc. Co.* (1899) 44 App. Div. 224; but later cases properly have. *Bauer* v. *Dewey*, supra; *Long* v. *Burke*, supra. Besides actions equitable in form, *Johnston* v. *Donvan* (1887) 106 N. Y. 269, it applies to replevin, *Goldstein* v. *Shapiro*, supra.

REAL PROPERTY—OWNERSHIP OF RIVER-BED—NAVIGABILITY.—A city street in Peoria was bounded by the Illinois River. *Held*, it extended to the stream center. *Chicago etc. Ry. Co.* v. *People* (Ill. 1906) 78 N. E. 790. The river at that point is navigable at law because navigable in fact. *Ballance* v. *Peoria* (1899) 180 Ill. 29, 36.

Common law "navigability" was determined by tidal ebb and flow, *Deerfield* v. *Arms* (1835) 17 Pick 41, 42, and its incidents were sovereign ownership of the bed, admiralty jurisdiction and public common of fishing. Hale, DeJure Maris cap. iv. In this country the federal courts have extended "navigability," for purposes of admiralty jurisdiction, to waters commercially navigable in fact. *Genesee Chief* v. *Fitzhugh* (1851) 12 How. 443. Many state courts have created extensions to secure the public right of navigation, *Brown* v. *Chadbourne* (1849) 31 Me. 9; *Moore* v. *Sanborne* (1853) 2 Mich. 519, which rested in England upon public user. Hale De Jure Maris, cap. iii. These courts are divided as to property in the soil above tide; some holding that the results of this extension should be only co-extensive with its cause, *Walker* v. *The Board* (1847) 16 Ohio 540; *Steamer Magnolia* v. *Marshall* (1860) 39 Miss. 109, and others that any distinctive nature of our waters sufficient to justify an extension of "navigability" justifies similar extensions of all common law incidents. *Shrunk* v. *Navigation Co.* (Penn. 1826) 14 S. & R. 71; *Schurmeier* v. *Ry. Co.* (1865) 10 Minn. 82. The reason for the assumption of admiralty jurisdiction, see *Genesee Chief* v. *Fitzhugh*, supra, renders the latter view more logical, but many of these states have made valuable floatage the test, *Moore* v. *Sanbourne*, supra, and the former view there seems inevitable. Such states could, however, more logically give a public easement above the limits of admiralty jurisdiction. See *Adams* v. *Pease* (1818) 2 Conn. 481.

REAL PROPERTY—RULE IN SHELLEY'S CASE—CONDITIONAL FEE.—The plaintiff held under a deed which in the granting clause conveyed to him a life estate; the habendum clause read: "To have and hold the same * * * during his natural life, and to the heirs of his body and their assigns in fee simple forever." All of the plaintiff's children were born after this grant to him and before the contract in suit; and claimed, as interveners, a remainder in fee, after his life estate. *Held*, the Rule in Shelley's Case gave the plaintiff a fee simple absolute; or, even if the Rule did not apply, yet, since the Statute *De Donis* had "never been in force in this state * * * the estate conveyed was a conditional fee * * * and, in either event," the plaintiff "could convey good and perfect title after the birth of a child." *Kepler* v. *Larson* (Ia. 1906) 108 N. W. 1033.

Although the case of *Pierson* v. *Lane* (1882) 60 Ia. 60, followed in the principal case, undoubtedly holds that the Statute *De Donis* is not in force in Iowa, it is said to "leave undetermined the question whether a gift to A and the heirs of his body gives him a fee simple conditional." Gray on Perpetuities, 2nd ed. § 19, *n.* See also Tiffany, Real Property, § 24, *n.* The decision in the principal case, however, must settle the law in Iowa on the subject. However, the court fell into confusion when, after "conceding *arguendo* that the Rule in Shelley's Case does not apply," they go on to state as an alternative that, in any event, a conditional fee passed. If the Rule did not apply, then, obviously, the interveners, the plaintiff's children, took title as purchasers to a remainder in fee after the plaintiff's mere life estate, and the plaintiff had no fee, either conditional or absolute. *Simms* v. *Buist* (1898) 52 S. C. 554.

SALES—CONDITIONAL—RISK OF LOSS.—A gasoline engine was sold and delivered upon condition that the title and right of possession should remain in the vendor until payment had been made in full. Before all the payments under the contract had been made or had become due, the engine was wrecked by fire without fault of the vendees. *Held*, the vendor could recover the balance of the purchase price. *Jessup* v. *Fairbanks, More & Co.* (Ind. 1906) 78 N. W. 1050.

The general rule that the risk of loss follows the title has been applied in some decisions to place the loss on the vendor who retains title as security for the purchase money. *Randall* v. *Stone* (1886) 77 Ga. 501; *Bishop* v. *Minderhout* (1900) 128 Ala. 162; Meechem, Sales §§ 634, 635; distinguish *Swallow* v. *Emery* (1873) 111 Mass. 355; *Arthur* v. *Blackman* (1894) 63 Fed. 536, and similar cases, as contracts to sell rather than conditional sales. In other cases the general rule has applied to place the loss on the equitable owner rather than on the possessor of the naked legal title. *Topp* v. *White* (Tenn. 1873) 12 Heisk. 165; *Osborn* v. *South Shore Lumber Co.* (1895) 91 Wis. 526. The court in the principal case ignore the question of title and ground the vendee's liability upon his absolute promise to pay, the consideration being possession coupled with the right to acquire title. This decision seems sound in principle, is supported by authority, *Burnley* v. *Tufts* (1888) 66 Miss. 49; *Soda Fountain Co.* v. *Vaughn* (1903) 69 N. J. L. 582; *Lavalley* v. *Ravena* (Vt. 1905) 62 Atl. 47, and furnishes a satisfactory working rule.

TORTS—ASSUMPTION OF RISK—WHEN NOT APPLICABLE.—The plaintiff while standing on the step of the defendant's car was injured through the negligence of the motorman. The jury found that there was no contributory negligence. The defendant requested an instruction on the law of assumption of risk, which the lower court refused. *Held*, upon appeal, that the refusal was correct, for this was not a case where the doctrine of assumed risk was applicable. *Chicago Consolidated Traction Co.* v. *Shrilter* (Ill. 1906) 78 N. E. 820.

Either assumption of risk, or contributory negligence, or both may be pleaded to an action for negligence. *Davis Coal Co.* v. *Pollard* (1901) 158 N. Y. 607. Whether assumption of risk be considered as a contractual liability, *Narramore* v. *Ry. Co.* (1899) 96 Fed. 298, or as a waiver of a right, *Martin* v. *Chicago Ry. Co.* (1902) 118 Ia. 148, since intention is a necessary element of either, Anson's Law of Contracts, 2d. Amer. Ed. 2; Bouvier, 1207, it is necessary in the plea of assumption of risk to set forth that the plaintiff fully understood the danger of such injury as he later suffered, and voluntarily assumed the risk of it. *Drake* v. *Ry. Co.* (1903) 173 N. Y. 466. If there was an assumption of any risk by the plaintiff in the principal case it was when he took up his position upon the step, and at that time he cannot possibly be held to have contemplated the motor man's future negligence, and to have assumed the risk of the danger resulting therefrom. The refusal of the court to instruct as requested was, therefore, correct.

TORTS—NEGLIGENCE—NOT IMPUTED TO PASSENGER.—Plaintiff had hired a buggy from a livery-stable, which also supplied the driver. Approaching a railroad crossing at night, the whistle of a locomotive was heard. The buggy was stopped and both plaintiff and driver listened, and looked in opposite directions. The driver did not see the train which was approaching him, nor did he hear it, the bell not being rung. Plaintiff, seeing a light far up the track, took it for the headlight, and said so. The buggy was set in motion and hit by the train. *Held*, plaintiff could recover, though driver may have been negligent in not seeing the train. *Cotton* v. *Ry. Co.* (Minn. 1906) 109 N. W. 836.

The principal case deals thoroughly and accurately with these facts. A servant's contributory negligence is imputable to the master. *Penn. Ry. Co.* v. *Righter* (1880) 42 N. J. L. 180. A servant is one over whom there is control, *Little* v. *Hackett* (1886) 116 U. S. 366, or the right to control, *Allen* v. *Willard* (1808) 57 Pa. St. 374; 1 COLUMBIA LAW REVIEW

199. A public hack driver is not subject to the right of control, *Quarman* v. *Burnett* (1840) 6 M. & W. 499; N. *Y. etc. Ry. Co.* v. *Steinbrenner* (1885) 47 N. J. L. 161; and control is a question of fact. An English case, *Thorogood* v. *Bryan* (1849) 8 C. B. 114, decided that the hack-driver's negligence was imputable to the passenger, because of the latter's identification with the vehicle; but while followed in some jurisdictions, *Ritger* v. *Milwaukee* (1872) 25 Mich. 274; *Phila. & Ry. Co.* v. *Boyer* (1881) 97 Pa St. 91, it itself has been overruled, *The Bernina* (1887) L. R. 12 Pro. Div. 58, and is rejected by the weight of authority in this country, *Little* v. *Hackett*, supra; *Transfer Co.* v. *Kelly* (1880) 36 Oh. St. 86, on the ground that the identification is a fiction and contrary to justice. *Chapman* v. *Ry. Co.* (1859) 19 N. Y. 341.

TRADE-MARKS AND NAMES—TRADE NAMES—EXTENSION OF RULE PROTECTING BY INJUNCTION.—An employé and officer of plaintiff corporation, the "United States Frame & Picture Co.," opened a place of business of his own and used stationary and advertising cards so closely resembling those of plaintiff as to deceive, and published notices of removal calculated to lead persons to believe that reference was made to plaintiff and not to defendant, and also used the name "New York Frame & Picture Co." *Held*, to constitute unfair competition except as regarded the use of the name which did not show an intent to deceive so as to authorize an injunction. *U. S. Frame & Picture Co.* v. *Horowitz* (1906) 100 N. Y. Supp. 705. See NOTES, p. 120.